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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

ESTATE OF JAMES MAAKESTAD; LISA
MAAKESTAD, a single woman;

Plaintiffs,

vs.

MAYO CLINIC ARIZONA dba MAYO
CLINIC SCOTTSDALE, an Arizona
corporation; LORI ANN DECEGLIA, an
individual; PAMELA MILLER, an
individual;

Defendants.

Case No. CV04-2183-PHX-DGC

**PLAINTIFFS' MOTION FOR
RECONSIDERATION RE:
DEFENDANTS' MOTION IN
LIMINE NO. 3 RE: THE
WRITINGS OF JAMES
MAAKESTAD AND MOTION
IN LIMINE NO. 9 RE: MEDICAL
EXAMINER'S REPORT**

(Honorable David G. Campbell)

Defendants filed Motion in Limine No. 3 Re: The Writings of James Maakestad and Motion in Limine No. 9 Re: Medical Examiner's Report. At the Pretrial Conference held on September 21, 2006, the Court heard oral argument regarding these and other motions in limine filed by the parties. By Order dated October 2, 2006, the Court granted Defendants' Motion in Limine No. 3 on the grounds that the writings referred to in Defendants' Motion were not admissible as present sense impressions under Federal Rule of Evidence 803(1), and granted Defendants' Motion in Limine No. 9 pursuant to Federal Rule of Evidence 403. Plaintiffs submit this Motion for Reconsideration in that the writings are admissible hearsay, either in whole or in part, under Federal Rules of Evidence 803(6), for the reasons provided herein.

1 **I. Background**

2 Plaintiff James Maakestad (“Plaintiff” or “Mr. Maakestad”) was employed
3 by Defendant Mayo Clinic Arizona (“Mayo”) from December 1999 until his
4 employment was terminated by Mayo on June 28, 2004. Plaintiff filed this lawsuit
5 against Mayo and individual defendants on October 14, 2004, alleging, *inter alia*,
6 that he was subjected to sexual harassment, gender discrimination, and retaliation in
7 violation of Title VII. During and after Plaintiff’s employment with Mayo, he filed
8 complaints of sexual harassment and retaliation with Mayo and the EEOC, and
9 drafted other documents in support of these complaints and in response to
10 disciplinary actions by Mayo against him (collectively, the “Writings of James
11 Maakestad”) including: (1) the July 8, 2004 Complaint he filed with the EEOC; (2)
12 Identified Acts of Retaliation and Chronology of Communication between
13 Employee and Management; (3) February 11, 2004 letter to Pam Miller; (4)
14 Amended Summary of Incidences of Inappropriate Behaviors; (5) Summary of
15 Incidences of Inappropriate Behaviors; (6) April 26, 2004 Complaint of
16 Management Retaliation; (7) E-mail correspondence; (8) July 2, 2004 Response to
17 Mayo Clinic’s Response; (9) Response to Corrective Action of June 21, 2004; and
18 (10) Response to Corrective Action of June 28, 2004. Plaintiffs also produced a
19 copy of the Medical Examiner’s Report created after James Maakestad’s death.

20 **A. The Contested Evidence is Admissible Hearsay Under Federal**
21 **Rule of Evidence 803(6).**

22 “Hearsay” is a statement, other than one made by the declarant while
23 testifying at the trial or hearing, offered in evidence to prove the truth of the matter
24 asserted. Fed. R. Evid. 801(c). Records of regularly conducted business activity,
25 including a memorandum, report, record, or data compilation, in any form, of acts,
26 events, conditions, opinions or diagnoses by a person with knowledge are
27 admissible if properly authenticated under Rule 902(11) or 902(12). Fed. R. Evid.
28 803(6).

1 Rule 803(6) requires that a qualified person testify that it is the practice of
 2 the business to make the record and that the record is kept in the course of regularly
 3 conducted business activity. The foundation requirement for Rule 803(6) “may be
 4 satisfied by the testimony of anyone who is familiar with the manner in which the
 5 document was prepared, even if he lacks firsthand knowledge of the matter
 6 reported, and even if he did not himself either prepare the record or even observe its
 7 preparation.” *Miller v. Fairchild Industries, Inc.*, 885 F.2d 498, 514 (9th Cir. 1989)
 8 (citing 4 Louisell and Mueller, *Federal Evidence*, § 446, at 663-64 (1979)
 9 (footnotes omitted). The court in *Miller* observed that “...we have previously noted
 10 that ‘[i]t is not [even] necessary that a sponsoring witness be employed by
 11 the business at the time of the making of each record. . . . [O]bjections, relating to
 12 the identity or competency of the actual preparer, may [be] relevant to the
 13 evidentiary weight or credibility of the documents, but [do] not [affect] their
 14 admissibility.’” *Miller v. Fairchild Industries, Inc.*, 885 F.2d at 514 (citing *United*
 15 *States v. Smith*, 609 F.2d 1294, 1302 (9th Cir. 1979) (quoting *United States v.*
 16 *Evans*, 572 F.2d 455, 490 (5th Cir. 1978)).

17 In employment discrimination cases, internal documents such as personnel
 18 files “relied upon by the employer in making an employment decision are not
 19 hearsay as that term is defined in that term is defined in Fed.R.Evid. 801(c) –
 20 statements offered to prove the truth of the matters asserted. Rather, such
 21 documents are relevant and admissible because they help explain (or may help
 22 explain) the employer's conduct.” *Wolff v. Brown*, 128 F.3d 682, 685 (8th Cir.
 23 1997); *see also Hardie v. Cotter & Co.*, 849 F.2d 1097, 1101 (8th Cir. 1988); *Jones*
 24 *v. Los Angeles Comm. College Dist.*, 702 F.2d 203, 205 (9th Cir. 1983); *Moore v.*
 25 *Sears, Roebuck & Co.*, 683 F.2d 1321, 1322 (11th Cir. 1982).

26 “The touchstone of admissibility under [Rule 803(6)] is reliability, and a
 27 trial judge has broad discretion to determine the admissibility of such evidence. . . .”
 28 *United States v. Bueno-Sierra*, 99 F.3d 375, 378-79 (11th Cir. 1996).

1 In response to Plaintiffs' First Request for Production of Documents,
 2 Request No. 6, in which Plaintiffs requested the production of the personnel file of
 3 James Maakestad (attached hereto as Exhibit 'A'), Defendants responded that it had
 4 previously produced documents in "Mayo's Initial and Eight Supplemental
 5 Disclosure Statements" and additionally produced documents identified by Mayo
 6 Bates Numbers MAYOM000001-116. (Defendants' Response to Plaintiffs' First
 7 Request for Production of Documents, attached hereto as Exhibit 'B'). Mayo's
 8 Initial Disclosure Statement and Amended Initial Disclosure Statement, in turn,
 9 identified numerous documents that are now the subject of Defendants' Motions in
 10 Limine No. 3 and No. 9 (attached hereto as Exhibits 'C' and 'D', respectively.) The
 11 Amended Disclosure Statement, Section B., identifies with particularity documents
 12 more generally identified in Defendants' Initial Disclosure Statement, including:
 13 (1) Various Personnel/Human Resources documents related to Plaintiff James
 14 Maakestad including but not limited to complaint and investigation documents;
 15 corrective action documents; performance evaluations; documentation re:
 16 performance errors; management notes; internal transfer requests; job fitness
 17 reports; and related documents;.... (4) Medical Examiner's Records; (5) E-mail
 18 Correspondence, including but not limited to e-mails exchanged between Mayo
 19 employees and James Maakestad; e-mails exchanged between Mayo employees
 20 regarding James Maakestad; and e-mails exchanged between Plaintiff James
 21 Maakestad and his parents and other relatives; (6) Various document[s] from
 22 Plaintiff's EEOC file.

23 All of the documents that Mayo seeks to exclude in Motions in Limine
 24 No. 3 and No. 9 were records maintained by Mayo in James Maakestad's personnel
 25 file and/or produced by Mayo in response to Plaintiffs' request for production of
 26 Mr. Maakestad's personnel file. As the *Wolff* court observed, documents
 27 maintained in an employee's personnel files are not hearsay under Rule 801(c), but
 28 are relevant and admissible for purposes of explaining the employer's conduct.
Wolff v. Brown, 128 F.3d at 685.

B. Authentication of the Documents

Authenticity of documents admissible under Rule 803(6) may be established by a written declaration of the custodian of the documents or another qualified person. Fed. R. Evid. 902(11). However, parties offering documentary evidence at trial may satisfy the foundational requirements of Rule 803(6), thus making unnecessary the authentication process of Rule 902(11), through the testimony of a person who has knowledge of the documents. *See Miller v. Fairchild Industries, Inc.*, 885 F.2d at 514; *United States v. Nobmann*, No. 03-0304, (N.D. Cal. July 26, 2005), at pp. 9-10.

The foundation for the documents produced by Mayo in response to Plaintiffs' request for James Maakestad's personnel file will be laid through the trial testimony of human resource personnel – Danita Hale and Vickie Lampert – who personally handled James Maakestad's personnel file. Both Ms. Hale and Ms. Lampert are identified in the Pretrial Order as witnesses who the parties will or may call at trial.

II. Conclusion

For the foregoing reasons, Plaintiffs respectfully request that the Court vacate its ruling granting Defendants' Motion in Limine No. 3 Re: The Writings of James Maakestad and Motion in Limine No. 9 Re: Medical Examiner's Report and allow Plaintiffs to proffer the writings of James Maakestad and the Medical Examiner's Report without requiring that Plaintiffs first approach the Bench and demonstrate that such writings are admissible hearsay and authenticated.

RESPECTFULLY SUBMITTED this 4th day of October, 2006.

LAW OFFICE OF ROBERT M. GREGORY, P.C.

By: s/Robert M. Gregory
Robert M. Gregory
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I certify that I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants, and mailed a copy of same to any non-registrants this 4th day of October, 2006:

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